SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 991

CAPITOL GREYHOUND LINES AND CAPITOL GREYHOUND LINES OF INDIANA, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS L. TALLENTIRE,
LEONARD GARVER, JR.,
Counsel for Petitioners.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Matter Involved.

The matter involved is whether the National Labor Relations Board in the conduct of its affairs is authorized (after agreeing in wirting (R. 129-131) with the Petitioners for the holding of a consent election and setting forth in said consent agreement a list of voters eligible to participate) to ignore the provisions of the consent agreement and to exclude from said list of employees certain classes of persons, including among others, to-wit:

1. Those on the list who may be ill and consequently unable to appear at the polls to vote.

2. Those employees who by reason of unexpected change in schedules are unable to reach any of the polling places while the polls are open.

3. Those eligible employees who, although specifically named on the list, have been inducted in the military service of the United States and by reason thereof are unable to appear in person at the polls and vote.

4. By counting the vote of one ineligible to vote.

5. By refusing to rule as to a vote improperly challenged.

The most important effect of the decision of the Circuit Court of Appeals, is to deny (although otherwise deemed eligible by the Board) to an employee of the Company, who is in the military service of the United States, the right to cast a vote in determining who is to be the bargaining agent for the particular unit of which he may be a member, unless he is able to appear in person when the polls are open. Insofar as we have been able to determine, this question has never before been in this Court for determination and in view of the fact that millions of our citizens are now in the armed forces, its importance becomes self-evident.

The instant case was decided January 31, 1944 by the Circuit Court of Appeals, Sixth Circuit, in an opinion written by Judge Martin, concurred in by Judge Hamilton and Judge McAllister and published in 140 F. (2d) 754. A petition for rehearing was filed on the 29th day of February, 1944 and denied by the Court on the 7th day of April, 1944. The statutory provisions to sustain the jurisdiction of this Court are found in Judicial Code Sec. 240 as amended in 28 U. S. C. A. Sec. 347 and the statute of the United States which is involved is known as the National Labor Relations Act. The pertinent parts of the Act are set forth in the appendix.

The consent agreement provided that

> "the determination of the Regional Director shall be final and binding upon any question (including questions as to the eligibility of voters) raised by either party hereto relating in any manner to the election *and not specifically covered in this agreement.*" (Italics ours.)

The Board, in its dealings in this case, left all questions arising out of the election to the determination of the Regional Director, ignoring completely the extremely important modification of his power as provided in the consent agreement, to-wit: that his powers to determine questions only extended to

> "*matters not covered in this agreement*" (R. 129-131).

Although the Regional Director was granted broad powers in the consent agreement, he did not have the right to disfranchise any eligible voter, either directly, by forbidding him to vote, or indirectly, by failing to make fair and adequate provisions to enable all eligible persons to cast their ballots.

The Court, as stated in its opinion, committed the same error, and felt constrained that its power to review any action of the National Labor Relations Board was extremely limited in this class of cases and that even

> "inferences of the Board were binding on the reviewing Court." (See Syllabus supra.)

It is averred that the Court erred in that it ignored the legal principles involved in a consent election carried out under a contractual agreement.

Facts.

Upon petition (R. 127) filed on August 8, 1942 by the Amalgamated Association of Street, Electric Railway and

Motor Coach Employees of America, Div. 1299, A. F. L., hereinafter called the Union, with the National Labor Relations Board, hereinafter called the Board, for investigation and certification of representatives, an election was held on September 2, 1942 under "Agreement for Consent Election" (R. 129-131) entered into on the 22nd day of August, 1942, by and between Capitol Greyhound Lines and Capitol Greyhound Lines of Indiana, Inc. (designated in said agreement as Capitol Greyhound Lines and Subsidiaires), hereinafter called Petitioners, and the Union; the terms of such agreement being approved by the Regional Director of the Ninth Region of the Board. The Unit for the purpose of such election was "all bus drivers". Ballots were cast at polls located in Cincinnati, Ohio; Louisville, Kentucky; Flora, Illinois; St. Louis, Missouri; Clarksburg, West Virginia and Washington, D. C.; places and times of the day for voting being set forth in a schedule marked "Annex A" (R. 133) attached to such agreement and an eligible list of voters being attached as "Annex B" (R. 133) to such agreement.

"Certification of Counting and Tabulation of Ballots" (R. 143) dated September 4, 1942, prepared by the Regional Director of the Board, discloses that there was a total of seventy-three names on the eligible list, that a total of sixty-three ballots were cast, out of which total one ballot was challenged and that the result of the election, excluding the challenged ballot, was thirty-two votes cast for the Union as the collective bargaining agent of the Unit and thirty votes cast against said Union as such bargaining representative.

Timely objections to the conduct of the ballot (R. 147) and the determination of results based thereon were filed with the Regional Director by Petitioners, in which Petitioners complained that the ballot taken was incomplete and

that the determination of a collective bargaining representative based thereon is not an accurate, true and fair determination of the question submitted.

Petitioners, in such Objections, complained that although the eligible list of voters contained seventy-three names, the name of John E. Nolan appeared on such list through error in that the pay-roll period ending August 15 was inadvertently used instead of the pay-roll period ending July 31, 1942, as provided for in the Consent Election Agreement, with the result that Nolan was permitted to vote despite the fact that he was not a bus driver for Petitioners during the pay-roll period ending July 31, 1942; further that one Clyde O. Thomas was first denied the right to vote, and finally, upon being permitted to vote by order of the Regional Director, his vote was challenged and not included in counting of the ballots; further that no provision was made prior to the election for securing the vote of four of Petitioners' bus drivers that were then and are now in active military service of the United States, such drivers being Bruce R. Radcliff, Charles H. Cole, William H. Fite and William E. Lynch; further that two bus drivers, namely, Elwin E. Haines and William M. Fritz, were deprived of their right to vote by reason of the fact that they were ill and confined to their homes on election day and that no provision was made before the election to secure their votes. Petitioners further complained that two bus drivers, Charles A. Smith and Burton E. Holcomb, were deprived of their right to vote by reason of the fact that the schedule operated by Smith on the day of the election did not permit him to get to the polls until after same were closed and by reason of the fact that Holcomb, at an early hour on the morning of the election day, was assigned to operate a charter bus for transporting selectees from Leesburg, Virginia, to the

induction center at Charlottesville, Virginia, with the result that he was unable to get back to Washington, D. C., until after the polls were closed and that no provision was made before the election to secure their votes.

Petitioners, in such Objections, requested that the vote of Thomas be counted; that the vote of Nolan be eliminated; that provision be made to secure the votes of those deprived of their right to vote because of illness, inability to reach the polls before same were closed and by reason of being in the military service of the United States, before a determination of a representative for collective bargaining based on the results of the balloting was made, or in the alternative that said election be set aside and held for naught, and that a new election be held under the direction and supervision of the Board.

On November 24, 1942, the Regional Director made his "Report on Consent Election" (R. 150), in which report he found and determined that the Union had been designated and selected by a majority of the employees in the agreed unit as the exclusive bargaining representative of the employees within the unit.

On November 27, 1942 Petitioners filed a "Notice of Appeal" (R. 263) and "Petition for Review" (R. 265) with both the Regional Director and the Board in Washington and on December 4, 1942 the Board rejected said Petition without a hearing (R. 264) on the ground that the Petitioners had no right to appeal to the Board the Regional Director's rulings on objections in view of the fact that the election was conducted by the Regional Director under a consent election agreement.

On December 17, 1942, Petitioners filed a "Petition for Declaratory Judgment" in the District Court of the United States, Southern District of Ohio, Western Division, same being docketed as Case No. 603 (R. 77) in which action Petitioners sought the judgment of the Court as to whether

the Union is the exclusive bargaining representative of Petitioners' bus drivers.[1]

On January 6, 1943 the Union filed a charge against Petitioners (R. 9) with the Regional Director, charging that Petitioners were engaging in unfair labor practices within the meaning of Sections 8 (1) and 8 (5) of the National Labor Relations Act in that Petitioners have since November 25, 1942 refused to recognize the Union as the representative of Petitioners' bus drivers.

On January 7, 1943 the Regional Director issued and served upon Petitioners a "Complaint" (R. 10), in which complaint is made regarding said unfair labor practices alleged and set forth in the Union's charge. On January 15, 1943 Petitioners filed with the Regional Director their "Answer to Complaint" (R. 16).

On January 27, 1943 hearing was held at Cincinnati, Ohio, on the "Unfair Labor Practice Complaint," with William P. Webb presiding as Trial Examiner (R. 51-126).

On February 18, 1943 Trial Examiner Webb made and filed with the Board his "Intermediate Report" (R. 19) recommending that the Union's Complaint against Petitioners be dismissed in its entirety.

On February 20, 1943, the Chief of the Order Section transferred the case to the Board as Case No. C-2533.

On March 6, 1943, the Union filed a "Statement of Exceptions to Intermediate Report of Trial Examiner" and a brief in support of such exceptions with the Board (R. 38).

The Board, on April 27, 1943, made its "Decision and Order" (R. 42) in which it found that Petitioners have

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[1] The "Petition for Declaratory Judgment" was dismissed without prejudice by the District Court, at Petitioners' Request, on March 8, 1943, after Trial Examiner Webb's "Intermediate Report" (R. 19) was made on February 18, 1943, in which he recommended to the Board that the Union's Complaint against Petitioners be dismissed in its entirety.

engaged in and are engaging in unfair labor practices in that Petitioners refused to bargain collectively with the Union and ordered Petitioners to cease and desist therefrom and to bargain collectively upon request with the Union.

Enforcement of the above order was sought by the Petitioners in the Circuit Court of Appeals for the Sixth Circuit and the order of the National Labor Relations Board was affirmed by the Court. A timely application for rehearing was also filed, which was overruled on April 7, 1944. A certified copy of the entire record of said case in the United States Circuit Court of Appeals is attached and made a part of this petition and marked "Exhibit A" in compliance with the rules of this Court.

Assignments of Error.

Your Petitioners assign as error the refusal of the United States Circuit Court of Appeals to reverse the order of the National Labor Relations Board, finding that the Petitioners were engaged in unfair labor practices within the meaning of Section 8 (5) (1) of the National Labor Relations Act and in failing to set aside the Board's Order requiring the corporation to cease and desist from their unfair labor practices and to take certain affirmative action.

Reasons for Allowance of Writ.

Your Petitioners are advised and believe that said judgment is erroneous and contrary to the decisions of this Honorable Court in similar causes; that the wrong construction and application of the aforesaid Act of Congress was made by said Circuit Court of Appeals; that the said Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Honorable Court; and that this Honorable

Court should require the case to be certified to it for its review and determination in conformity with the provisions of U. S. C. A. Title 28, Sec. 347, formerly Sec. 240 of the Judicial Code.

Wherefore, your Petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all of the proceedings of said Circuit Court of Appeals in said case entitled "National Labor Relations Board vs. Capitol Greyhound Lines and Capitol Greyhound Lines of Indiana, Inc." to the end that the case may be reviewed and determined by this Honorable Court, as provided by U. S. C. A. Title 28, Sec. 347 (Sec. 240, Judicial Code as amended) and that the said judgment of said Circuit Court of Appeals for the Sixth Judicial Circuit in said case and every part thereof may be reversed by this Honorable Court.

CAPITOL GREYHOUND LINES and
CAPITOL GREYHOUND LINES OF
INDIANA, INC.,
By THOMAS L. TALLENTIRE,
LEONARD GARVER, JR.,
Counsel for Petitioners.

STATE OF OHIO,
County of Hamilton, ss:

Thomas L. Tallentire, being first duly sworn, deposes and says that he is the Attorney for Petitioners and that said Petitioners, to-wit: Capitol Greyhound Lines is a corporation organized under the laws of the State of Virginia and Capitol Greyhound Lines of Indiana, Inc., is a corporation organized under the laws of the State of

Indiana; and that the facts set forth in the foregoing petition for certiorari and all the exhibits attached thereto, are true as he verily believes.

THOMAS L. TALLENTIRE.

Sworn to before me and subscribed in my presence this 10th day of May, 1944.

HELEN MCCLURE,
Notary Public in and for
Hamilton County, Ohio.

[SEAL.]

I certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

THOMAS L. TALLENTIRE,
Counsel for Petitioners.

SUPPORTING BRIEF OF PETITIONERS.

This is an application for a writ of certiorari for a review of the decree of the United States Circuit Court of Appeals for the Sixth Circuit, affirming an order of the National Labor Relations Board finding that the Petitioners had engaged and were engaging in unfair labor practices within the meaning of Section 8 (5) and (1) of the National Labor Relations Act, in failing to bargain collectively with a labor union following a consent election relative thereto, the validity of which is challenged by Petitioners, and whether upon such findings the Board's Order, requiring the Petitioners to cease and desist from their alleged unfair labor practices was valid and proper under the Act.

First Point.

Board Determines Unit: Those in Said Unit Must Not Be Excluded from Voting.

The Board must determine the unit for an election, and when once determined, those in that unit must not be excluded from voting.

In the case of *Northrop Corp.* v. *Madden*, 30 F. Sup. 993, the Court on page 994 held:

> "The complaint that the Board has excluded certain departments from participation and that such exclusion does not conform to the requirements of the Act that the Board designate the appropriate unit for the purpose of collective bargaining, if well taken, would affect the jurisdiction of the Board to call the election, and would be reviewable."

In the case of *Nashville C. & St. L. Ry.* v. *Railway Employees Dept.*, 93 F. (2d) 340, syllabus 5, the Court held:

> "Under Railway Labor Act defining 'employee' as every person in service of carrier * * * railroads

> furloughed employees * * * were 'employees' entitled to participate in election * * * P. 343—these (furloughed employees) 'have not only a future but a present interest in all negotiations which affect hours of labor, rates of pay and working conditions governing the craft in which they have long been schooled and disciplined'."

The Courts have heretofore held that there must be a fair opportunity for all members of the unit to vote, which was certainly not given in this case to the four employees in military service who obviously, in the absence of a mail ballot being sent to them, could have no opportunity to the vote, nor were the others who were sick on the day of the election and the others who by reason of change in their schedules were unable to appear at the polls during the hours that the polls were open, given a fair opportunity to vote. No procedure whatever was set up by the Board to provide a fair opportunity to these eligible voters to cast their ballots. To this effect, see *N. L. R. B.* vs. *Whittier Mills Co.*, 111 F. (2d) on page 474, where the Court says:[2]

> "*Where with fair opportunity to all members of the unit to vote,* a majority do vote, they are so to speak, a quorum to settle the matter, and the majority of that quorum binds those not voting, and suffices to select the bargaining representative of the unit." (Italics ours.)

In the case of *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 458, Justice Black said, in referring to Sec. 9 of the Act as vest-

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[2] An additional case holding that the agent must be selected by the majority of the employees is found in *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874. On page 886 the Court held: "*Where a union or other bargaining agent has been selected by a majority* of the employees * * * the employer's statutory duty is to bargain." (Italics ours.) In the case of *Marlin* v. *Rockwell Corp.* v. *N. L. R. B.*, 116 F. (2d) 586, the Court on page 587 held: "Only if the Board has acted arbitrarily, may its discretion in determining the appropriate unit be overridden by the Courts."

ing in the Board the power to select the method of determining what union, if any, employees desire as a bargaining agent, to this end, the Board

> "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

This opinion well shows the sweeping powers of the Board, and it need not sacrifice (in its laudable desire for speed) the right of *each* eligible employee of the unit involved to register his vote. Any such result is contrary to the letter and spirit of the Act and by reason thereof defeats the object for which the Act was passed. No true American will object to letting his brother who may be bearing arms at the moment, register his vote, merely because by so doing there may be a delay in securing the final results. In the case at bar, the Board failed to make arrangements to take a secret ballot of all eligible employees listed specifically in the consent agreement.

SECOND POINT.

The N. L. R. B. Failed to Make Provisions Enabling Absent Soldiers to Vote.

The refusal of the National Labor Relations Board to make adequate provision for soldiers to vote is founded on the alleged claim of impracticability; however, where, under the language of the statute the intent of Congress is plain, it is the duty of the Courts to apply the statute as it stands, even if the consequence is hardship or injustice, which is not present in the case at bar and which could not result from the circumstances here. We further contend that such action on the part of the Board is both arbitrary and capricious.

In the case of *Fur Workers Union Local #72* v. *Fur Workers Union* #21238, 105 F. (2d) 1, affirmed 308 U. S. 522, 84 L. E. D. 443, the Court held:

> "The Board apparently considers it a hardship for the civilian employees to be delayed in determining who shall be their representative. From the reading of the Act, it is plain that Congress considered that all employees of the unit determined by the Board should have the opportunity of self expression."

Where fair opportunity has been given to all eligible voters to vote, unless the bargaining agency is selected by a majority of the employees so eligible to vote, it has no authority.

In the case of *Pueblo Gas & Fuel Co.* v. *N. L. R. B.*, 118 F. (2d) 304, on page 307 the Court held:

> "The authority of the bargaining agency to represent the employees *must* be sought in the consent of the employees." (Italics ours.)

In the *Frank Bros. Co.* v. *N. L. R. B.*, recently decided by this Court, the Court held:

> "Syllabus 2 * * * a bargaining relationship *once rightfully established* must * * * be permitted to exist * * * U. S.-88 L. Ed. 773, decided 4-10-44. (Italics ours.)

The employer cannot be too careful in labor disputes in ascertaining who is the proper bargaining agent, lest he find himself in the dilemma thrust upon employer, Medo, as disclosed in the case of *Medo Supply Co.* v. *N. L. R. B.*—U. S.—88 L. Ed. 749, wherein he was found guilty of engaging in an unfair labor practice, because he negotiated with a committee who claimed to represent a majority of the employees. The employer is very apt to be between Scylla and Charybdis in his dealings with his employees in many

of the matters involved in the National Labor Relations Act.

While the Board is vested with great discretion in determining eligibility (*N. C. St. L. Ry.* v. *R. E. D.*, 93 F. (2d) 340, 344), nevertheless, when once it has determined who is eligible, to so conduct an election that a component part of those eligible are denied an opportunity to vote, is not in conformity with the provisions of the Act as laid down by the Congress. The Board did not carry out the consent agreement in that it failed to make fair and adequate provision for all eligible employees to vote.

THIRD POINT.

Regarding Claim that Regional Director's Position Is Analogous to that of an Arbitrator.

In the brief of Counsel for the National Labor Relations Board, filed in the Circuit Court of Appeals, much is made of the fact that the conduct of this election was left to the sole discretion of the Regional Director and his decision was in the nature of that of an arbitrator and was to be final. The said Court also in its opinion, quoted with approval the same cases cited in the brief aforesaid (p. 758 of Opinion). However, an arbitrator is required to give effect to the instrument of submission (consent election agreement in the case at bar). If he does not, the arbitration will be set aside.

> * * * "These stipulations, by which part of the partnership assets is disposed of, are, in legal effect, incorporated into the submission, and limit the authority of the arbitrator. He could do nothing to alter or affect them. * * * The radical error of the arbitrator seems to have been, that he disregarded these arrangements of the parties * * *".
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> *McCormick* v. *Gray*, 13 Howard (U. S.) 26, 14 L. Ed. 36 also cited in 3 Am. Jr. 971.

The act of the Regional Director, in failing to conduct this election so that all the eligible employees had a reasonable opportunity to vote, did not give effect to the consent agreement and certainly was in derogation of the rights of the thirty individuals who cast votes against the Union. Where there was such a large percentage against the Union (there being only an alleged majority of two), the Regional Director should have been particularly meticulous in seeing that every eligible voter had a reasonable opportunity to cast his ballot. While the consent agreement provided that the Board would conduct an election among all employees listed in such agreement, the election as conducted by the Board omitted a large part of such eligible employees.

FOURTH POINT.

Re Nolan's Vote.

In the record (R. 120) it is also strongly argued that the Petitioners were too late in challenging Nolan's right to vote. The fact remains, however, that the Petitioners were given five days' time under the terms of the consent election agreement in which to file a protest and it was during that time that the protest was so filed; hence, Petitioners objected seasonably and are in no way estopped from raising the questions presented here.

In contending that Nolan's vote should be and was properly counted, the Board takes the inconsistent position of standing on the "Consent Election Agreement" and at the same time asking the Court to disregard the provision of such agreement (R. 130) that expressly states an election shall be conducted among *all employees* in the Unit who were employed by Respondents during the pay-roll period ending July 31, 1942. We contend that the sound and well considered logic of the Trial Examiner's reasoning is ap-

parent when, in his "Intermediate Report" (R. 33-34), he said:

> "The Agreement for Consent Election stated distinctly that an election would be conducted among all employees in the unit who were employed by the respondent during the pay period ending July 31, 1942. The undersigned finds that this provision of the agreement takes precedence over the erroneous eligibility list which was attached to the agreement * * * It is also to be presumed that when the Union and the Respondents agreed on the eligibility date of July 31, it was for the purpose of excluding from the balloting any bus drivers employed subsequent to that date. The fact that Nolan's name appeared on the voting schedule and that he was actually a bus driver at the time of the election does not alone render him eligible to vote."

If Nolan, who was employed as a bus driver by the Company on August 8, 1942 (R. 176) was properly permitted to vote, then all other drivers employed during the period from July 31, 1942 to September 2, 1942, should also have been permitted to vote before the result of the balloting is truly and fairly representative and the order of the Board designating a bargaining agency can be said to be made in the light of the freely and frankly expressed wish of a majority of the employees as required by law.

In the case of *N. L. R. B.* v. *Automotive Maintenance Machine Co.*, 116 F (2d) 350, the Circuit Court of Appeals held as follows:

> "An order of the Board designating a bargaining agency must be made in the light of the freely and frankly expressed wish of the majority of the employees as to Union preference."

The situation which arose, when the Board's attention had been called to the Nolan vote, was quite a simple one inasmuch as his name on the list of eligible voters was merely a

clerical mistake. It is quite analogous to the case of *Moffett Hodgkins & Clark Co.* v. *Rochester,* 178 U. S. 373, 44 L. Ed. 1108, decided by this Court in an opinion written by Justice McKenna and published on May 21, 1900. The suit grew out of errors in the proposals of a firm of contractors for the execution of certain improvements conducted by the City of Rochester, N. Y.

One of the errors consisted in a charge for excavating 2000 cubic yards. The firm intended to bid $15.00 per cubic yard; however, a clerk by mistake inserted $1.50 per cubic yard. In addition, there were other mistakes not necessary to mention.

Before the acceptance of the bid (and in the case at bar, during the 5 days allowed to protest under the consent election agreement) the attention of the city was called to the errors.

The city contended that it was impelled by the commands of its charter to accept the bid. (In the case at bar, the N. L. R. B. contended that in following the Act, it could not throw out Nolan's vote).

The Circuit Court of Appeals in the *Moffett* Case supra, in deciding for the city and against the contractors, held that the position taken by the contractors

> "was well calculated to excite distrust on the part of the Board and induce its members to believe that the alleged mistakes were an *afterthought,* conceived when the complainants had become convinced by studying the proposals of its competitors that it could not profitably carry out the contract on the terms proposed". (Italics ours)

(In the case at bar the N. L. R. B. took the position

> "It would be * * * improper for the Regional Director * * * to overturn the election on a ground which only a hindsight sharpened by an adverse

result belatedly applied". See N. L. R. B. Brief in C. C. A., page 25.

and the Circuit Court of Appeals decided that it was not a super-canvassing Board.)

However, in the *Moffett* Case supra, this Court said (page 387):

"We are unable to concur in either of these conclusions"

and proceeded to relieve the contractors from all liability on a $90,000.00 surety bond which they had signed.

This Court, in the *Moffett* Case supra, quoted with approval from the opinion of Justice Swayne in *Hearne* v. *Marine Ins. Co.*, 20 Wall 488, 22 L. Ed. 395, where the Justice in speaking of the power of the courts to give relief says:

> "The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement, as reduced to writing, omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred."

In the case at bar *only* those employees who were employees July 31, 1942 were eligible to vote and through a clerical mistake, Nolan's name was inadvertently inserted, even though he was not employed by the Company on that date. While the National Labor Relations Act requires the Court to sustain the acts of the N. L. R. B. when sustained by evidence, nevertheless, the Board must proceed according to law. The question of Nolan's vote is a question of law. Although he was on the list, his being placed there was an act of inadvertence, which is not denied in the record. As the Trial Examiner pointed out, two wrongs do not make a

right (R. 34). When the attention of the Board was called to the fact that he had voted although ineligible to vote, there were several steps which the Board could have taken. It could have ascertained how Nolan voted and reduced the number of votes so cast by one; it could also have permitted those who were denied an opportunity to vote to cast a ballot or it could have thrown out the election and ordered a new one to be held. Instead the Board chose to affirm an invalid election, thereby penalizing the employee negative voters for the mistake of the clerk of Petitioners in inadvertently placing Nolan's name on the list of eligible voters. This was particularly unfair on the part of the Board. It should be remembered that the form of consent election agreement used in this case was prepared by the Board (R. 22, 23). Such being the case, it is elementary that in the event of any inconsistency, a construction should be placed on the contract favorable to the side which merely signed, but did not prepare the agreement.

In the Intermediate Report of Examiner Webb, he pointed out, (R. 36):

> "If Nolan voted for the Union, the result would be 31 ballots for the Union and 31 against the Union. * * * In view of the doubt, in respect to Nolan's vote, the undersigned is unable to find * * * that the Union, as a result of the consent election * * * represented a majority of the employees in the unit agreed upon by the parties * * *"

Section 9 (a) of the Act provides:

> "Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees * * *." (Italics ours.)

The Board refused to pass on the question as to the improper challenge of the vote of Thomas, who had cast his

ballot against the Union. Simple justice in determining the will of the majority in this case requires the giving effect of Thomas' vote and disregarding the ineligible Nolan vote which decisively affect the result of the election and disclose an evenly divided unit of employees wherein the Union does not have the required majority. The Board, nevertheless, by its order insists that the Union shall represent the employees as bargaining agent, notwithstanding the serious questions presented here.

If Petitioners are properly subject to any charge by the Board, it is conceivable that such would be that Petitioners had leaned over backward in remaining scrupulously aloof from its employees in the pre-election procedures and in insisting that the rights of all eligible voters be given proper consideration in this important matter; however, the propriety, indeed the necessity, of the course of conduct pursued by the employer in this case is well illustrated by the decision of this Court in the *Medo* case supra, wherein the Court makes plain the obligation upon the employer not to negotiate or bargain collectively with any employee representatives unless they be properly selected as the duly constituted bargaining agency. The following is quoted from page 752 of the opinion:

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see Sec. 9 (a) of the Act, 29 U. S. C. A. Sec. 159 (a), 9 F. C. A. title 29, Sec. 159 (a), it exacts 'the negative duty to treat with no other'."

Summation.

The Board did not make proper arrangements to carry out its agreement to conduct an election among all eligible employees although the Board conducts thousands of elections each year. From this vast experience, there seems

to be no valid reason why omission was made by the Board to take care of situations as herein presented. Failure to make such provision can well have the effect of permitting small, but highly vocal minorities to control such elections.

The rule of the National Labor Relations Board, under which the votes of employees specifically eligible to vote, presently serving in the armed services of the United States are not taken by mail ballot (certainly the only feasible method of obtaining the same), is most unjust to our fighting men and we submit, not permitted under the provisions of the election agreement in the case at bar. The reason advanced by the Board that such method would cause undue delay, blatantly ignores the soldiers' rights. To disfranchise the soldier (because of the short delay that may result in securing his vote by mail) in the determination of the bargaining agent is not in accordance with our idea of Anglo-Saxon justice and is manifestly an unjust discrimination against those directly engaged in the war, whose rights it is the plain duty of the Courts to protect, especially during the period of their absence. It is also contrary to the expressed principles of the Commander in Chief of the armed forces,[3] as well as being violative of Section 9 (a) of the National Labor Relations Act and contrary to the spirit of the Soldiers' & Sailors' Relief Act. The principles involved and the effect on the soldier individually in the labor elections in many cases are even more important to him than is the result of a political election. Hence, a rule which disfranchises these men is most unfair, capricious and arbitrary, richly meriting the condemnation of this Court.

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[3] In his message returning the bill to the Congress permitting absentee soldiers to vote, President Roosevelt called the bill as finally passed, "a fraud on the soldiers and sailors and marines * * * upon the American people because of the way in which it tended to disfranchise the soldier. No State or Federal red tape should take from our young folk in the service their right to vote".

Conclusion.

We believe that we have clearly demonstrated in our petition and this supporting brief, need for the review by this Honorable Court of the action of the National Labor Relations Board in the election in this case, where its Regional Director counted the vote of a man not eligible to vote, threw out the vote of one eligible to vote and failed to make fair and adequate provisions for a large percentage of eligible employees to vote.

The essence of the Act is to ascertain the wishes of the majority of the employees. If, by reason of unforseen contingencies, it becomes necessary to so arrange transportation schedules that it is impossible for men to work and at the same time vote; if men becoming ill find that no arrangements whatever are made for them to vote; if soldiers in the service are denied the right to vote because of their being in the service; then the proceedings are a delusion and a snare for they defeat the very objective of the Act, to-wit: the determination of the will of the majority of the employees as to an agency for collective bargaining.

In conclusion, we respectfully submit that the Circuit Court of Appeals has decided important questions of federal law in this case which have not been, but should be, settled by this Court.

Respectfully submitted,

THOMAS L. TALLENTIRE,
LEONARD GARVER, JR.,
Counsel for Petitioners.

APPENDIX.

The relevant portions of the National Labor Relations Act are as follows:

* * * * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, * * * collective bargaining * * *.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the repre-

sentatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * * * *

Sec. 10 * * *

(c) * * * If * * * the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, * * * as will effectuate the policies of this Act. * * *

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

* * * * * * *

No. 331

In the Supreme Court of the United States

OCTOBER TERM, 1943

CAPITOL GREYHOUND LINES AND CAPITOL GREYHOUND LINES OF LOUISIANA, LTD., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 991

CAPITOL GREYHOUND LINES AND CAPITOL GREYHOUND LINES OF INDIANA, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 268–277) is reported in 140 F. (2d) 754. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 19–38, 42–50) are reported in 49 N. L. R. B. 156.

JURISDICTION

The decree of the court below (R. 267) was entered on January 31, 1944. A petition for rehearing, filed by petitioners on March 1, 1944 (R. 279–280), was denied on April 7, 1944 (R. 287). The petition for a writ of certiorari was filed on

May 11, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether an election in which 63 employees voted out of a total of 73 on the eligibility list should be set aside because of the Board's failure to make a special canvass of those who were prevented from voting by illness, their duties, or active military service.

2. Whether upon discovering, subsequent to the announcement of the results of an election conducted by secret ballot, that an employee whose name appeared on the eligibility list stipulated by all parties, and who voted without challenge, was in fact ineligible, the Board must treat him as having voted for the union and deduct his vote from the number cast for the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra,* pp. 19–21.

STATEMENT

On August 22, 1942, petitioners and the Union[1] entered into, and the Regional Director approved,

[1] Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 1299, affiliated with the American Federation of Labor.

an "Agreement for Consent Election" upon a form customarily provided by the Board to facilitate the determination of questions concerning representation (R. 129–134). This agreement stipulated that all bus drivers employed by petitioners constituted a unit appropriate for the purposes of collective bargaining, and that an election should be held under the Regional Director's supervision "among all employees in the Unit who were employed by the Employer during the pay-roll period ending July 31, 1942, including employees who did not work during such pay-roll period because they were ill or on vacation or in the active military service or training of the United States * * *" (R. 129–130). It also provided that the election should be held "in accordance with the Act, the Rules and Regulations and the customary procedures and policies of the Board," and that "the determination of the Regional Director shall be final and binding upon any question (including questions as to the eligibility of voters) raised by either party hereto relating in any manner to the election and not specifically covered in this Agreement" (R. 130).

It was further provided that the election be held on September 2, 1942, at specified places and times set forth in a schedule attached to the agreement and marked "Annex A"; that petitioners post notices of the election furnished by the Regional Director at "conspicuous and usual posting places easily accessible to the eligible voters";

and that annexed to the agreement, and marked "Annex B," was a list "which all parties agree constitutes the sole and exclusive list of eligible voters" (R. 130–131). "Annex A" provided that the voting should take place between certain specified hours at Cincinnati, Ohio; Louisville, Kentucky; Flora, Illinois; St. Louis, Missouri; Clarksburg, West Virginia; and Washington, D. C. (R. 133). "Annex B" was a list of the eligible voters prepared by petitioners,[2] containing the names of 73 employees in alphabetical order, among them employee Nolan who petitioners later contended was erroneously included in the list (R. 133–134).

Thereafter, the Regional Director filled in the usual printed "Notice of Election," to which was attached a typewritten "Voting Schedule," which had been submitted by petitioners (R. 102, 110–111, 159), containing the names of all the employees eligible to vote (including Nolan's name), and designating the particular polling places and hours at which they were to vote (R. 101–102, 110–111, 135).[3] There was also a note on the "Voting Schedule" stating that "If any employee cannot

[2] Both "Annex A" and "Annex B" were prepared and submitted by petitioners, who, at the request of the Regional Director, brought them to the meeting at which the consent election agreement was signed (R. 62–63, 101–102, 185).

[3] Such a typewritten "Voting Schedule" specifying the eligible voters at each particular place is not normally attached to the printed "Notice of Election," but it was used in this case because of the number of polling places involved (R. 101–102, 110, 111, 112).

vote at the place designated for him, he may vote at any of the other polling places if he appears while the polls are open" (R. 135). These notices were posted at the various cities in which voting was to take place about 1 week prior to the election (R. 108, 63, 130).

The balloting was conducted at the various polling places on September 2, and a "Certification on Conduct of Election" was submitted for each polling place (including that at which Nolan was scheduled to vote), signed by observers on behalf of petitioners, the Union, and the Regional Director (R. 137–142).[4] These certifications stated that the balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote (R. 137–142). On September 4, 1942, the ballots were counted and a "Certification of Counting and Tabulating of Ballots" was executed by representatives of petitioners, the Union, and the Regional Director (R. 105–106, 143–144). This certification disclosed that the total number of employees on the eligibility list was 73, that a total of 63 ballots were cast, and that of these 32 were cast for the Union, 30 against the Union, and one

[4] At Clarksburg, West Virginia, only the Regional Director was represented (R. 63–64, 142). The "Voting Schedule" lists Washington, D. C., as the place at which Nolan was to vote (R. 135), although the record does not disclose whether he did vote there (R. 187–188, 230–231).

ballot was challenged and not counted (R. 104–105, 143–146).

The Regional Director notified the parties of the results of the election (R. 71, 143), and on September 9, 1942, petitioners filed with the Regional Director "Objections to the Conduct of Ballot in Consent Election," in which they objected to "any determination of results based" upon the consent election (R. 147–149). In these objections petitioners contended that the election was invalid because the Board did not make provision for voting by eight employees who failed to appear at the polls (four because they were in active military service, two because of illness and two because their work prevented their reaching the polling places while they were open), denied the right to vote to employee Thomas, whose ballot had been challenged on the ground that he was a supervisor, and improperly received the ballot of Nolan, who was not entitled to vote because he was not employed during the pay-roll period ending July 31, 1942, as required by the consent election agreement (*supra,* p. 3), although his name was erroneously on the list of eligible voters attached to that agreement (R. 147–149).

On October 27, the Regional Director held a formal hearing on petitioners' objections (R. 71, 86–87, 165–262). Witnesses were called to testify, documentary evidence was introduced, and a transcript of the proceedings was made (R. 165–

262). At the hearing, petitioners urged, despite the fact that at no time prior to the counting of the ballots had petitioners or any of the employees notified the Board that anyone would be unable to vote under the stipulated election arrangements, that the Board should have made special provisions to obtain the ballots of the eight employees who failed to appear at the polls (R. 168–169).[5] With respect to Nolan, petitioners contended that his name had been erroneously[6]

[5] The "Voting Schedule," which petitioners had prepared, specified the places and times for voting by each of the eight employees (R. 101–102, 110–111, 135). The testimony showed that employees Fritz and Haines were ill on the day of the election (R. 170, 191–192, 208–214) and that employees Lynch, Fite, Cole, and Radcliff were in active military service (R. 169–170, 196, 253–256). Testimony was also adduced that their duties on the day of the election had made it inconvenient (R. 204, 207, 236) or impossible for employees Smith and Holcomb to get to the polls (R. 170–172, 193–195, 201–207, 215–220, 237–238).

[6] The claimed error was ascribed by petitioners to the circumstance that in preparing the eligibility list the pay roll of August 15 was inadvertently substituted for that of July 31 (R. 177, 185). So far as appears from the record the pay rolls of July 31 and August 15 were identical except for Nolan's inclusion on the latter and absence from the first. Petitioners contended that in fact Nolan was first employed on August 8 (R. 176–177, 224). There was evidence, however, that the first trip for which Nolan was paid by petitioners took place on August 7 (R. 252), as well as additional documentary evidence, concerning which the record was not developed, which indicated that Nolan was in petitioners' employ as a trainee at least as early as August 1 (R. 257).

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included on the eligibility list although they made no showing (1) that he had voted for the Union;[7] (2) that they did not acquire knowledge of their alleged mistake until after the election;[8] (3) that Nolan was not employed in the appropriate bargaining unit at the time of the election; or (4) that any employee had objected to Nolan's eligibility either prior to or after the election.

On November 24 the Regional Director issued his "Report on Consent Election," in which he overruled petitioners' objections and determined that the Union had been designated and selected by a majority of the employees in the agreed upon bargaining unit as the exclusive bargaining representative of all the employees within the unit (R. 150–153). With respect to petitioners' claim that the absentees had not been specially canvassed, the Regional Director pointed out that customary Board procedures had been followed as the parties had agreed, and that the claim with respect to Nolan was invalid since petitioners had not only agreed that he was an eligible voter but

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[7] No proof was introduced that Nolan had actually voted in the election. It was merely stipulated by counsel, admittedly without knowledge that it was true, and in the belief that it was immaterial, that Nolan had voted (R. 187–188, 230–231).

[8] When questioned as to the time of the discovery of the alleged error, Vice President Graves replied, "It was discovered in my office just around election time, I don't know before or after" (R. 185).

had failed to exercise their right to challenge him at the election (R. 151–152).[9]

Thereafter, upon the refusal of petitioners to negotiate with the Union (R. 74–75, 154–155), charges were filed that petitioners had violated the Act (R. 9). On April 27, 1943, following the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law and order (R. 19–38, 42–50). The Board found that the rulings of the Regional Director on petitioners' objections to the conduct of the election were neither arbitrary nor capricious and hence were entitled to the finality and binding effect for which the parties had provided in the consent agreement (R. 46–47). It found that the Union had been duly designated by a majority of petitioners' employees in an appropriate bargaining unit and was, therefore, under Section 9 (a) of the Act, the exclusive representative of all the employees in such unit (R. 47).

The Board concluded that petitioners' refusal to bargain with the Union was an unfair labor practice within the meaning of Section 8 (1) and (5) of the Act (R. 48–49). It therefore ordered petitioners to cease and desist from their unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (R. 49–50).

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[9] These determinations made it unnecessary for the Regional Director to rule upon Thomas' challenged ballot since it could not affect the outcome (R. 153).

On July 12, 1943, the Board filed in the court below a petition for enforcement of its order against petitioners (R. 1–4). On January 31, 1944, the court handed down its opinion (R. 268–277) and on the same date entered its decree (R. 267) sustaining the Board's findings as to the unfair labor practices and enforcing the Board's order in full.

ARGUMENT

1. Petitioners urge (Pet. 1–2, 12–15) that the election is invalid because no provision was made for obtaining the votes of those prevented by illness, their driving schedules or active military service from appearing at the polls.

While the agreement for the consent election, following the Board's usual practice,[10] included among those eligible to vote employees who because of illness, vacation, or military service did not work during the pay-roll period used to fix eligibility (R. 130), it made no provision for obtaining the votes of those who did not appear at the polls. On the contrary, by specifying for each employee named on the eligibility list the exact hours and place at which he should cast his ballot (R. 101–102, 110–111, 135), the agreement showed the intent of all parties that only those who appeared in person to cast their ballots should be allowed to vote. Furthermore petitioners, as

[10] Eighth Annual Report of the National Labor Relations Board (Govt. Print. Off., 1944), p. 50.

well as the employees involved, failed to notify the Regional Director in advance of the election, or even on the day thereof, that there were eligible voters who could not vote unless some special arrangement for obtaining their ballots was made (R. 107, 178, 182–183). Their subsequent objections based on the lack of such provision cannot survive the established principle of election law,[11] firmly maintained by the Board in its election procedure,[12] which bars a post-election contest over any asserted irregularities concerning which opportunity for protest was not exercised prior to the determination of the result.

Collateral circumstances emphasize petitioners' default. The times and places of balloting were agreed upon after a careful examination of peti-

[11] See, *Allen* v. *Glynn*, 17 Colo. 338, 29 Pac. 670, *Bowers* v. *Smith*, 111 Mo. 45, 20 S. W. 101; *Taylor* v. *Girard*, 54 Idaho 787, 36 P. (2d) 773 and cases cited; *Cave* v. *Conrad*, 24 N. E. (2d) 1010, 1012 (Ind.); *Welsh* v. *Shumway*, 232 Ill. 54, 83 N. E. 549; *Schuler* v. *Hogan*, 168 Ill. 369, 48 N. E. 195, 198; *Swiney* v. *Peden*, 306 Ill. 131, 137 N. E. 405; *Matter of Orgel*, 125 N. Y. S. 291, 140 App. Div. 410; *Martin* v. *McGarr*, 27 Okla. 653, 117 Pac. 323.

[12] Cf. *Matter of Garod Radio Corp.*, 32 N. L. R. B. 1010 (where because no question about providing special facilities for voting of men drafted or ill was raised until after balloting was completed, objections were not sustained). See also, *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of Combustion Engineering Co.*, 7 N. L. R. B. 123, 124–126; *Matter of R. C. Mahon Co.*, 9 N. L. R. B. 430, 431; *Matter of International Freighting Corp.*, 6 N. L. R. B. 271, 272; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739; *Matter of Solvay Process Co.*, 37 N. L. R. B. 983.

tioners' bus schedules in order that all eligible voters might, in the normal course of business, have ample time to vote (R. 151, 227). Indeed, petitioners themselves submitted to the Regional Director the voting schedules used in the election which indicated the points at which each employee would vote (R. 101–102, 110–111, 135). These were posted the entire week preceding the election in plain view of all the employees (R. 63, 108, 130, 135). Thus, petitioners and the employees involved were in the best position to know who would be unable to vote and to suggest the making of other arrangements. Responsibility for the nonparticipation of these employees in the election can therefore scarcely be attributable to the Regional Director who, as agreed upon by the parties, conducted the election "in accordance with the customary procedure and policies of the Board"[13] (*supra*, p. 3).

2. Apart from the fact that petitioners cannot now complain that the Regional Director failed to ignore their wishes as to the manner in which the election was to be conducted, their contention with respect to the four employees who did not participate in the election because of illness or other duties is unsound. Industrial elections, like political elections, would not be workable if an additional canvass had to be conducted among

[13] See, for example, *Matter of Schwartz-Bernard Cigar Co.*, 7 N. L. R. B. 503.

those who, for one reason or another, failed to appear at the polls. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 560–561; *Nashville, Chattanooga & St. Louis Ry.* v. *Ry. Employees' Dept.*, 93 F. (2d) 340 (C. C. A. 6); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 114 F. (2d) 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.*, 134 F. (2d) 424 (C. C. A. 7), certiorari denied, 320 U. S. 753.[14]

3. Similarly, it is clear that the failure of the Board to poll four employees in active military service does not invalidate the election.[15] Nothing in the Act requires that employees absent for that reason be regarded as currently within the bargaining unit, although it was proper for the Board in the exercise of its discretion to treat them as such. In any event, the election was conducted in accordance with that customary administrative practice which the parties agreed should prevail. After a year of administrative experience in the matter, the Board thus explained in *Matter of Wilson & Co., Inc.*, 37 N. L. R. B. 944, 951–952 (1941) its reasons for abandoning in its election

[14] The cases cited in the Petition (pp. 11, 12, 14, 17) do not hold to the contrary; they merely assert the majority rule principle which is written into Section 9 (a) of the Act (*infra*, p. 19) and which was followed by the Board in this case (*supra*, p. 9).

[15] Cf. *Karloftis* v. *Helton*, 178 S. W. (2d) 959 (Ky. Ct. App.), certiorari denied, No. 982, this Term.

procedure mail balloting for those in active military service:

> While the reasons which impelled our adoption of the policy of extending eligibility to this group of employees are equally valid today, administrative experience in the ensuing months has demonstrated conclusively that it is impracticable to provide for mail balloting by this group. Administrative difficulties in determining the present location of men in military service have constantly increased with concomitant delays in arrangements for elections. The actual voting of the group by mail has seriously retarded the completion of elections in many cases, since substantial time has had to be allowed for receipt and return of mail ballots by eligibles in remote sections of the country. In addition, this form of balloting has frequently raised material and substantial issues relating to the conduct of the ballot and the election. On the other hand, actual returns from such mail ballots have been relatively small. Since time is of the essence in finally determining a collective bargaining agent when questions concerning representation affecting commerce arise, we are of the opinion that the policies and purposes of the Act will be best effectuated by continuing to recognize the eligibility of this group of employees but by discontinuing the practice of mail balloting.

> Accordingly, we are construing the eligibility provision in our directions of election relating to this group of employees to provide only that those employees in the group who appear in person at the polls to cast a ballot are entitled to vote, and we have administratively instructed our Regional Directors to that effect.[16]

4. Petitioners further contend (Pet. 2, 16–21) that the election is invalid because employee Nolan, whose name was erroneously included on the list of eligible voters, was allowed to cast a ballot. However, although petitioners and the employees, who had agreed to the eligible list, knew a number of days before the election that Nolan was listed as an eligible voter, they did not challenge or otherwise protest his vote prior to the completion of the balloting. The Board's election procedure, as in political elections,[17] bars post-election attacks upon eligibility where a party withholds exercising a challenge until after the determination of the results of the election. *Matter of Kellogg Switchboard & Supply Co.*, 28

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[16] Reaffirmed in *Matter of Edwin L. Wiegand Co.*, 44 N. L. R. B. 315, 317–318 (1942) and more recently, in *Matter of Mine Safety Appliances Co.*, 55 N. L. R. B., No. 215 (1944).

[17] *Davis* v. *Town of Saluda*, 147 S. C. 498, 145 S. E. 412; *Turregano* v. *Whittington*, 132 La. 454, 61 So. 525.

N. L. R. B. 847, 852; *Matter of Cudahy Packing Co.*, 4 N. L. R. B. 39, 41; *Matter of American Granite Finishing Co.*, 28 N. L. R. B. 739. Unless challenges are made prior to the voting, segregation of the ballots[18] is impossible, and a determination of ineligibility necessitates setting aside the whole election although in fact the ineligible voter may not have been included in the majority. Reasons for adherence to this doctrine clothing the election process with finality are peculiarly pressing here in view of petitioners preparation of the eligibility list[19] and failure to show that the alleged error was not discovered until after the election (*supra*, pp. 7–8). Cf. *Mehling* v. *Moorehead*, 133 Ohio St. 395, 14 N. E. (2d) 15.[20]

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[18] As the handling of Thomas' ballot shows (R. 143, 148, 223), challenged ballots are segregated by the Board.

[19] Petitioners (1) prepared the eligibility list and agreed that it was "the sole and exclusive list of eligible voters" (*supra*, p. 4n); (2) placed Nolan's name and an assigned polling station on voting schedules which they prepared (R. 101–102, 110–111, 135); (3) signed a "Certification on Conduct of Election" (R. 139) attesting that the balloting was fairly conducted and that all eligible voters were given an opportunity to vote at Washington, D. C., where Nolan was assigned to vote (R. 135); and (4) on the day of the election certified the accuracy of the total number of employees on the eligibility list (R. 143–144).

[20] Moreover, petitioners can show no prejudice from the Board's action. In a case such as this a pay-roll period prior to the date of the election is used to determine eligibility not for the purpose of qualifying the employer's bargaining obligation but to protect employees from changes effected

5. For the above reasons petitioners' contentions are without merit apart from their stipulation that the Regional Director's determinations were to be "final and binding." In addition, he ruled adversely to petitioners upon all the contentions here urged by them (R. 150–153). His determinations were certainly not unreasonable, and in the circumstances petitioners have no basis for attacking them. His ruling that voters had to present themselves at the polls was consistent with the terms of the agreement as well as with the Board's customary procedure. His decision that the election should not be upset because Nolan voted was entirely reasonable in view of the fact that, although the body of the agreement fixed eligibility by a pay roll ending just before Nolan began to work (*supra*, pp. 3, 7n), the attached list of eligible voters included him.

CONCLUSION

The decision below, enforcing the Board's order, is correct, and presents no conflict of decisions or

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by an employer subsequent to the agreement in order to influence the outcome of an election. See *Matter of Elliott Bay Lumber Co.* 9 N. L. R. B. 3. No claim is made that the Board denied others who were on the same pay-roll list as Nolan the right to vote, or that Nolan was not employed in the appropriate bargaining unit prior to the election, at the time of the election, and at the normally crucial time of the refusal to bargain.

question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JUNE 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group

of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the

Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

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